Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Public Utility District No. 1
of Pend Oreille County, Washington,

Petitioner,

v.

United States of America, and
Kalispel Tribe of Indians,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals and the United States District Court have jurisdiction to review, construe, amend or modify licensing orders issued by the Federal Power Commission under the Federal Power Act thirty years after such orders were issued by the Federal Power Commission.

2. Whether the holding in United States v. Clarke, 445 U.S. 253 (1980), should be overruled or distinguished as inapplicable in this case when (a) the FPC licensed the PUD's operations, (b) the Acting Secretary of the Interior approved alternative remedy in the FPC license, (c) the ownership of land was unknown until this litigation was concluded, and (d) a condemnation action was immediately commenced after the ownership issue was resolved.

3. Whether the United States Court of Appeals have the judicial power to reverse and overrule Findings of Fact entered by the district court which are supported by substantial evidence where there is no evidence or record to support the decision of the Court of Appeals.

PARTIES BEFORE THE NINTH CIRCUIT COURT OF APPEALS AND DISTRICT COURT

Petitioner:

Public Utility District No. 1 of Pend Oreille County (PUD) is a municipal corporation organized under the laws of the State of Washington which owns and operates a hydroelectric project licensed under the Federal Power Act and which distributes electric power in Pend Oreille County, State of Washington. The PUD was an appellee before the United States Court of Appeals for the Ninth Circuit in The United States of America v. Pend Oreille Public Utility District No. 1, 28 F.3d 1544 (9th Cir. 1994). The PUD was a defendant in United States of America v. Pend Oreille County Public Utility District No. 1, Docket No. C-80-116 in the United States District Court for the Eastern District of Washington.

Respondent:

The Respondent is the United States of America, an appellant before the United States Court of Appeals, Ninth Circuit, and the plaintiff in the United States District Court for the Eastern District of Washington.

Other Parties Below:

The Kalispel Indian Tribe was an appellant before the United States Court of Appeals, Ninth Circuit, and was an intervenor-plaintiff before the United States District Court for the Eastern District of Washington.

Other Parties Below (continued)

The State of Washington was an appellee before the United States Court of Appeals for the Ninth Circuit and was an intervenor-defendant before the United States District Court for the Eastern District of Washington. No issue herein affects the interests of the State.

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NO. _____

IN THE
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of Pend Oreille County, Washington,
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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (App. 4a) is reported at 28 F.3d 1544. The Ninth Circuit Court's Order denying rehearing was issued and filed on September 14, 1994 (App. 1a). The "Findings of Fact, Conclusions of Law, and Judgment" of the United States District Court for the Eastern District of Washington were filed on August 10, 1987 (App. 33a).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on July 14, 1994. The Order denying the Petition for Rehearing was filed on September 14, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

APPLICABLE FEDERAL LAWS

Section 6, Federal Power Act.

> "Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this Part and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 3743, Revised Statutes, as amended (U.S.C. title 41, sec. 20)." [16 U.S.C. § 799]

Section 313(b), Federal Power Act.

"Any party to a proceeding under this Act aggrieved by an order by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the

court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)." [16 U.S.C. § 825*l*(b)]

STATEMENT OF THE CASE

1. Nature of the Controversy.

This matter involves a claim for damages in trespass alleged by the United States on behalf of Kalispel Indians made 28 years after a license was issued by the Federal Power Commission pursuant to the Federal Power Act, and 17 years after the license was last amended. The PUD and the State of Washington claimed that the lands at issue were owned by the State. The trial court (the United States District Court for the Eastern District of Washington) resolved the property ownership dispute between the United States and the Kalispel Indian Tribe and the State of

Washington and the PUD.[1] The issues in the district court and the Ninth Circuit Court of Appeals were heard and determined in three phases: Phase I involved a property boundary-line of ordinary high water; Phase II involved ownership of river bed by Tribe or State; Phase III involved all other issues including damages, eminent domain/ condemnation, injunctive relief, and other claims. The claims arising under Phase I and Phase II were decided by the Ninth Circuit Court of Appeals in 926 F.2d 1502. The remaining claims were decided in 28 F.3d 1544 (9th Cir. 1994). It is the last decision of the Ninth Circuit Court of Appeals for Phase III that gives rise to this petition.

2. Facts Relating To The 1952 FPC License As Amended In 1963.

The FPC licensing orders are set forth in the Appendix at 47a (1963), 50a (1956) and 53a (1952). The 1952 License Order expressly recognized that the Box Canyon Project would affect "allotted lands within Calispel [sic] Indian Reservation." (App. 54a) The Box Canyon Project includes all lands within the project boundary "or the limits of which are otherwise defined... ." (App. 54a) The Box Canyon Project includes a reservoir backing water 55 miles upstream. (App. 55a) The Commission made an express finding that:

> (6) The issuance of license for the project as hereinafter provided will not interfere or be

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[1] See United States v. Pend Oreille Public Utility District No. 1, 926 F.2d 1502 (9th Cir. 1991), cert. denied, sub nom., Washington Department of Natural Resources v. United States, __ U.S. __, 112 S.Ct. 415, 116 L.Ed.2d 436 (1991).

> inconsistent with the purposes of any withdrawal of public lands nor with the purposes for which the Kaniksu National Forest was created or acquired.

(App. 61a) The Commission included Article 33 (App. 64a) which provides as follows:

> Article 33. The project shall be operated by the Licensee in such a manner as not to interfere with or damage Indian land of the Calispel Indian Reservation, or, in case such damage should occur as a result of the operation of the project, the Indians shall be compensated by the Licensee in the manner and amount as determined by the Secretary of the Interior, after consultation with the Calispel Indian Community Council and the Licensee.

When the 1952 licensing order was issued, the Commission included Article 33 based upon the request by the Acting Secretary of the Interior. (Compare Article 33 (App. 64a) with the Condition 7 requested by the Acting Secretary of the Interior. (App. 67a at 72a and 74a)) After the 1952 license was issued, the PUD acquired easements to various parcels of land on the Kalispel Indian Reservation. (See District Court Findings of Fact and Conclusions of Law and Judgment, Finding No. 5 (App. 36a))[2]

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[2] The PUD paid grazing value for the land, a fact that was proven to the district court. Grazing value was used by the district court to determine damages.

In 1956, the Commission approved all of the exhibits, including the exhibits showing the project boundary and the project area. (App. 50a) In 1963, the Commission approved an amendment to the license which allowed the PUD to raise the 55-mile reservoir and allowed the PUD to impose backwater on the Albeni Falls Project of the Corps of Engineers, Department of the Army, from one foot as provided in the 1952 license to two feet as provided in the 1963 license amendment. (App. 47a)

3. PUD Actions After 1963 And Prior To 1980.

After the license was amended in 1963, the PUD attempted to obtain additional easements from the United States, but was thwarted by delays by the government and the Tribe. (Finding No. 9, App. 37a, at 39a) The district court concluded that "the PUD did not act in bad faith." (App. 39a) There was a dispute over the ownership of the land affected by the Box Canyon Dam between the United States on behalf of the Indians and the Kalispel Indian Tribe and the State of Washington. The State claimed the lands under the equal footing doctrine. United States v. Pend Oreille Public Utility District No. 1, 926 F.2d 1502, 1505-1511 (9th Cir. 1991). After the district court determined ownership, the PUD commenced a condemnation action. See District Court Finding No. 15 (App. 41a) and United States v. Pend Oreille Public Utility District No. 1, 28 F.3d 1544, 1553 (9th Cir. 1994). The Ninth Circuit Court's 1994 opinion remanded the matter for further determinations with

respect to condemnation. (Id., App. 23a) The right of the PUD to condemn allotted land is clear.[3]

In March 1980, the United States commenced an action in the United States District Court for the Eastern District of Washington claiming trespass and damages rather than complete the easement process. The action was commenced within two weeks from the entry of this Court's decision in United States v. Clarke, 445 U.S. 253 (1980).[4] Prior to the decision in United States v. Clarke, a landowner could only

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[3] The PUD clearly has a right to condemn allotted Indian land. Section 21 of the Federal Power Act [16 U.S.C. § 814]; and 25 U.S.C. § 357. See Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

[4] The court's decision in United States v. Clarke reversed a decision and opinion authored by Judge Anthony M. Kennedy, 590 F.2d 765 (9th Cir. 1979). The facts in this PUD case are distinguishable from the facts in United States v. Clarke: (1) in this case, the PUD holds a license which authorized a reservoir affecting Indian lands; (2) the Federal Power Act authorizes the condemnation of lands if the licensee cannot otherwise acquire such lands by contract or pledge (16 U.S.C. § 814); (3) the PUD attempted to acquire such lands in good faith and it was the United States and the Indians that delayed the land acquisitions; and (4) the lands affected by the Box Canyon reservoir were subject to a dispute over ownership between the State of Washington and the United States and the Indians. Under these circumstances, the PUD should be held to have lawfully operated the Box Canyon Project under the FPC license. As will be discussed, infra, the PUD contends that neither the District Court nor the Ninth Circuit Court of Appeals had jurisdiction to rule on the legality of the PUD's operations under its license.

obtain just compensation in "inverse condemnation" for land entered by a person possessing a right of eminent domain. United States v. Clarke, 590 F.2d 765 (9th Cir. 1979).

4. Injunction Denied By District Court.

In this proceeding, the United States sought an injunction to prohibit the PUD from operating the Box Canyon Project in accordance with the terms and conditions of the license issued by the Federal Power Commission - holding the 55-mile reservoir at a level not to exceed two feet of backwater on the Albeni Falls Dam so long as the reservoir did not cause flooding above the level reached by the Pend Oreille River flowing at 90,000 cfs, the mean annual high water or mean annual flood. The district court denied the government's request for injunctive relief. (App. 41a and 43a)

The United States and the Tribe sought an injunction to bar the PUD from affecting any Indian land within the Kalispel Indian Reservation. Such injunction would prohibit the dam operation as provided by the FPC licensing order. The record before the district court showed that the PUD had attempted to obtain easements from the United States, in good faith, and that the PUD was frustrated by unreasonable and unexplained repeated delays by the United States and the Tribe. (See District Court Finding No. 9, App. 37a-39a; and Findings 15 and 16, App. 41a) The district court found that the Kalispel Indians would not suffer irreparable harm from continued operations and would be justly compensated for any loss.

5. Damages Determined By District Court.

In the action, the government sought damages on behalf of the Indian owners of the affected lands. The district court noted the language of Article 33 of the license (App. 34a and 64a) and, based on all the evidence, determined the amount of damages to be paid by the PUD for the years from 1956 through 1986 on an annual basis based upon actual use of similar land for cattle grazing. (App. 41a, 43a, and 45a-46a)

6. The Ninth Circuit Court Of Appeals Assumed Erroneous Facts And Reversed The District Court.

The United States and the Kalispel Indian Tribe appealed from the decision of the Court with respect to damages and the denial of the request for an injunction. The PUD appealed from decisions of the district court dismissing the PUD's counterclaim in condemnation and rejecting the PUD's request for declaratory judgment concerning the determination of future damages based upon the same formula determined by the district court. (See App. 41a and 45a-46a)

The United States Court of Appeals reversed the district court on the issue of damages and injunctive relief (App. 12a-20a, 28 F.3d at 1549-1552) and determined that the PUD was guilty of "trespass" and determined that the 1952, 1956 and 1963 Orders of the Federal Power Commission were not authorized by the Federal Power Act and did not authorize the PUD's long-standing operation of the Box Canyon Dam (App. 8a-11a). The Court of Appeals affirmed the district court with respect to the refusal to grant declaratory relief regarding the calculation of future damages (App. 20a-21a).

The Court of Appeals authorized and provided for the issuance of an injunction barring the PUD's long-standing dam operations under its FPC license. The Court of Appeals also made other rulings which are not material to this petition.

The PUD contends that the appellate court's review of the issue of trespass, injunctive relief and damages was, in fact, a judicial review of the licensing orders issued by the Federal Power Commission thirty to forty years ago. (See App. 8a-11a) The appellate court reversed the district court's findings by conducting a limited review of selected portions of the licensing orders and correspondence in the Commission files, but without the benefit of the entire record before the district court or the Federal Power Commission. (See App. 9a-11a, 28 F.3d at 1547-49) In fact, the appellate court made numerous statements alleging facts which have no basis in any findings by the district court or in any record before the district court and which are expressly refuted by the findings and determinations made by the Federal Power Commission.[5] In essence, the appellate court reviewed the

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[5] (A) The appellate court concludes that the issue of trespass was decided by the court in its previous opinion. In reaching such conclusion, the appellate court ignores the fact that the court's own orders provided that in Phase I and Phase II the parties were to brief the issue of ordinary high water mark and the issue of aboriginal title to the stream bed, and that all of the other issues were to be briefed later in Phase III, which issues included the issue on trespass. The appellate court's procedural orders are shown at App. 26a-32a. Thus, the gratuitous statement of the appellate court in its first opinion with regard to trespass was mere

(continued...)

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[5](...continued)
dicta. The statements are set forth at 926 F.2d at 1505.

(B) The appellate court went on to review and reach conclusions concerning Article 33 of the 1952 FPC license. The appellate court only reviewed the language of Article 33 and did not review the entire 1952 license language. The appellate court selected language from a letter to the Commission but ignored the remainder of the language of that letter, which is set forth at App. 67a et seq. The appellate court concluded that the United States could file a trespass action despite the actions and the statements of the Secretary of the Interior to the Federal Power Commission in the 1952 letter, the ongoing negotiations between the PUD and the Bureau of Indian Affairs referred to in the trial court's Finding No. 9, and the fact that the Federal Power Commission had concluded that the lands affected by the Box Canyon Project were "allotted lands."

(C) The appellate court concluded that the Commission failed to make findings as required by § 4(e) of the Federal Power Act [16 U.S.C. § 797(e)]. (App. 10a, 28 F.3d at 1548) The appellate court ignored the clear statement by the Commission that the project would occupy allotted lands within the Indian Reservation (App. 53a) and the findings of the Commission that the project would not interfere or be inconsistent with the purposes of any withdrawal of public lands (Finding (6) at App. 61a).

(D) The appellate court made general conclusions that the Secretary of the Interior did not determine the conditions necessary to protect the Indian Reservation and that the Commission did not fix an annual charge for use of "Reservation land." (App. 10a, 28 F.3d at 1548) Again the appellate court ignored the Commission's conclusion that the project would occupy "allotted lands within

(continued...)

licensing orders of the Federal Power Commission thirty to forty years after those orders were issued, and long after such orders were final and not subject to review under § 313(b) of the Federal Power Act [16 U.S.C. § 825ℓ(b)].

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[5](...continued)
Kalispel Indian Reservation" and the Secretary's conditions for the project - the project should not cause additional flooding during flood flows (the mean annual flood of 90,000 cfs), and that the PUD should pay just compensation which would be determined by the Secretary after consultation with the PUD. (See App. 58a-59a, 64a (Article 33), 72a and 74a) The appellate court concluded that the PUD flooded Indian land "only after the Kalispel Indians refused to grant similar easements." (See note 2 at App. 8a, 28 F.3d at 1547) This erroneous statement by the appellate court was made without any record or any evidence, and is factually untrue. The PUD flooded the lands under the assumption that (1) the lands belonged to the State, and/or (2) the United States would negotiate in good faith and grant an easement, as it had after the 1952 FPC Order.

(E) The appellate court concluded that the PUD failed to disclose "that Reservation land would be flooded by the project." (App. 10a, 28 F.3d at 1548) Without any record or evidence, the appellate court disregarded the clear language of the 1952 Commission order. The Commission acknowledged that the project would affect "allotted lands within Calispel [sic] Indian Reservation." (App. 53a) The court's conclusion also ignores the statements made by the Acting Secretary of the Interior in his letter to the Federal Power Commission. See App. 67a at 72a and 74a) The Secretary was fully informed about the Box Canyon Project. The appellate court's conclusions with respect to the PUD have no basis in fact or in the evidence.

REASONS FOR GRANTING THE PETITION

1. This Court Should Resolve The Important Federal Question Concerning The Validity Of The Rights Of A Licensee Under The Federal Power Act When Challenged Under The Guise Of A Trespass Action In A United States District Court.

This case involves an attempt by the United States and the Kalispel Indian Tribe to require the PUD to change its operation of a hydroelectric project duly licensed by the Federal Power Commission under the Federal Power Act [16 U.S.C. § 791a, et seq.] forty years after the license was issued and thirty years after it was amended. The decision of the Ninth Circuit Court of Appeals would require the PUD to either involuntarily apply to the Federal Energy Regulatory Commission to amend the PUD's license in order for the PUD to continue operating its project in the same manner that it has operated such project for the past thirty years OR to cease operating such project in such manner and thereby reduce the output of the licensed project. See the Ninth Circuit Court's opinion reversing the district court which denied an injunction and the remedy suggested by the Ninth Circuit Court. (App. 18a-20a, 28 F.3d at 1551-52)

By its opinion, the appellate court concluded that the PUD was not authorized, by the FPC license, to affect the Indian lands. Yet, the FPC license expressly acknowledge that the Box Canyon Project would affect allotted Indian lands on the Kalispel Indian Reservation (App. 53a) and the license included Article 33 which was expressly requested by the Acting Secretary of the Interior (App. 64a, 72a, and 74a).

The effect of the decision of the appellate court is to overrule and reverse the Federal Power Commission with respect to the construction and operation of the Box Canyon Dam. In 1952, the PUD was authorized to construct the Box Canyon Project and to operate the project by creating a reservoir 55 miles in length and raising the water on the tailrace of the Albeni Falls Project constructed and operated by the Corps of Engineers, United States Department of the Army, for flows up to 90,000 cfs. (App. 60a and 70a) The appellate court mistakenly noted in its opinion (App. 10a, 28 F.3d at 1548) that "the license stated the water level would be higher in normal flows 'for possibly 24 miles upstream.'" The statement in the license is as follows:

> (4) In the river channel immediately above the proposed Box Canyon dam and for possibly 24 miles upstream, the water level will be higher than under natural conditions for flows up to about 90,000 cubic feet per second due to the operation of the Box Canyon project, but with the same flows, water levels farther upstream will differ little from natural conditions. For flows above 90,000 cubic feet per second, the operation of the project will have little if any effect on water levels. In general, damage to privately owned lands will be small but will have to be compensated for by the licensee where it does occur. ...

(App. 58a-59a) This is the difficulty that arises when an appellate court, without a record before it, makes mistaken assumptions of fact and then relies on those assumptions in reaching its ultimate conclusions. The facts are indisputable

and clear. The Federal Power Commission was fully informed concerning all aspects of the Box Canyon Project and its effects on the navigable Pend Oreille River for the 55-mile stretch from the Box Canyon Dam to the Albany Falls Project. As noted by the appellate court, the Kalispel Indian Reservation was located thirty miles upstream from the Box Canyon Dam or approximately midway between the Box Canyon Dam and the Albany Falls Project. Yet, for reasons that are not explained by the court's opinion, the court assumed that the Federal Power Commission was misinformed concerning the impacts of the Box Canyon Project when it issued the license in 1952. (App. 10a, 28 F.3d at 1548)

The appellate court also erroneously assumed that any or all of the lands affected by the Box Canyon Project were tribal lands embraced within a reservation which required the fixing of a reasonable annual charge. (App. 10a, 28 F.3d at 1548) This assumption on the part of the appellate court flies in the face of the express statement in the 1952 Commission Order that the lands affected by the project within the Kalispel Indian Reservation were, in fact, "allotted lands." (App. 53a) Allotted lands are subject to condemnation under § 21 of the Federal Power Act [16 U.S.C. § 814] and under 25 U.S.C. § 357. Therefore, the reliance by the appellate court on § 10(e) of the Federal Power Act [16 U.S.C. § 803(e)] is misplaced.

Finally, the appellate court referred to the location of the project boundary six miles downstream from the Kalispel Indian Reservation, apparently as an indication that the Federal Power Commission was uninformed by the PUD and acted without knowledge of the facts. Nothing could be

further from the truth. It is evident that in 1952 the Commission had a full understanding of the project and had an extensive record before it. (See the 1952 Commission Order, App. 53a et seq.) Furthermore, it is also clear that the Acting Secretary of the Interior had a full and complete understanding of the effects of the project. (See the Acting Secretary's 1952 letter, App. 67a et seq.) With full and complete information before it, the Commission approved project exhibits, including an exhibit showing the project boundary. (1956 Commission Order, App. 50a et seq.) Finally, in 1963 the Commission approved the raising of the 55-mile reservoir from one foot of backwater on the Albeni Falls Project to two feet of backwater on the Albeni Falls Project and approved revised project exhibits. (1963 Commission Order, App. 47a et seq.)

The PUD contends that neither the district court nor the appellate court had the jurisdiction or the authority to review the Orders issued by the Federal Power Commission in 1952, 1956 and 1963, or to reach conclusions that the Commission erred in reaching its decisions or that the Commission's decisions should be construed differently than the construction given those decisions for more than thirty years by the Commission, and until 1980 by the Secretary of the Interior. By reviewing the Commission decisions and then reversing the district court with respect to damages and providing for an injunction requiring the PUD to change its operations, the appellate court has invaded the jurisdictional bar created by Congress under § 313(b) of the Federal Power Act [16 U.S.C. § 825*l*(b)] and has violated the PUD's rights protected by § 6 of the Federal Power Act [16 U.S.C. § 799]. This Court should grant certiorari in this matter and determine the jurisdiction of the district court and the

appellate court herein with respect to the issues arising under the Federal Power Act.

2. The Federal Energy Regulatory Commission Has Primary Jurisdiction Under The Federal Power Act.

The appellate court erroneously concluded that the PUD was not authorized to inundate the Indian lands within the Kalispel Indian Reservation pursuant to the licensing orders, and that the PUD should be enjoined unless the PUD amended its license or lowered the reservoir.[6]

Rather than concluding that the Commission or the PUD violated law and that the PUD trespassed on Indian lands, the appellate court should have recognized that it had no

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[6] The appellate court reversed the district court's findings and conclusions denying the injunction requested by the United States. This conclusion was based, in part, on the erroneous presumption that the lands at issue were tribal lands which cannot be condemned and the conclusion that the United States is not bound by Article 33 of the license which was requested by the Acting Secretary of the Interior. (App. 9a [28 F.3d, 1548], and App. 18a-20a [28 F.3d, 1551-1552]). The appellate court then apparently concluded that the district court should issue an injunction with the possibility of a stay if the PUD seeks an amendment of its license to satisfy the Federal Power Act requirements of § 4(e) and § 10(e), which the appellate court presumed had either not been satisfied when the 1952 license was issued. As previously stated, such presumption is dependent upon the conclusion that tribal lands within the reservation were affected in 1952 or in 1963, a presumption for which there is no record either before the Commission, before the district court, or before the Secretary of the Interior. See App. 20a, 28 F.3d 1552.

jurisdiction over such matters or should have abstained from rendering an opinion on such matters. As previously discussed, the collateral attack on the PUD's rights under the FPC licenses is untimely, and the district court and the appellate court had no jurisdiction to review or attack the PUD's rights under such license. The appellate court should have recognized that the Federal Energy Regulatory Commission (FERC) has primary jurisdiction to enforce its own licensing orders, and the appellate court should have abstained from rendering opinions concerning such licensing orders in the absence of a determination by the FERC pursuant to the Federal Power Act. The United States should have sought a remedy affecting dam operations from the FERC. The Federal Power Act includes § 306 [16 U.S.C. § 825e], which authorizes any person to file a petition with the Commission if a person believes that a licensee may have violated any provision of a license. The Commission is required to investigate such matters. (Id.) In 1986, Congress gave additional enforcement powers to the Commission. (16 U.S.C. § 823b, added by PL 99-495, § 12, 100 Stat. 1255 by Act of October 16, 1986)

Congress has prescribed an exclusive means by which decisions are to be made under the Federal Power Act. Under § 313(b) [16 U.S.C. § 825ℓ(b)], a person aggrieved by an order of the Commission is first required to timely file a petition for rehearing. If such petition is denied, the aggrieved person is then required to timely file a petition for judicial review in the appropriate court of appeals. All issues that were raised or which could have been raised are deemed to have been decided in the proceeding. No other court has jurisdiction to decide issues arising under the Federal Power Act, the decision of which was delegated by Congress to the

Federal Power Commission, now the FERC. Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958). The district court had no jurisdiction to determine the validity or the adequacy of the FPC licensing orders. Id. See also California Save Our Streams Council v. Yeutter, 887 F.2d 908 (9th Cir. 1989); and DiLaura v. Power Authority of the State of New York, 982 F.2d 73 (2d Cir. 1992). Although the court of appeals did not state the basis of its jurisdiction in its opinion, its jurisdiction is derived solely from 28 U.S.C. § 1291 (appeal of final decisions of the district court). Appellate courts are obligated to satisfy themselves as to their own jurisdiction and the jurisdiction of the District Court. Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986). Federal courts are not courts of general jurisdiction. They only have the power that is granted under Article III of the United States Constitution and by statutes enacted by Congress within the authority granted by the Constitution. Id. Here, Congress neither granted the appellate court nor the district court jurisdiction to review or overrule orders entered by the Federal Power Commission under the Federal Power Act thirty to forty years after those orders were entered. Thus, the appellate court's determination that the Commission was mislead by the PUD and that the Commission's orders violated § 4(e) and § 10(e) of the Federal Power Act and that the district court should enjoin the PUD's operation of the Box Canyon Dam under the PUD's license are invalid and have no effect as being beyond the jurisdiction of the district court and the court of appeals.

Not only did the appellate court, and the district court, lack jurisdiction to review the licensing orders of the Federal Power Commission, but the appellate court failed to

recognize that Congress has delegated the exclusive power over the terms and conditions of licenses to the Federal Power Commission (now the Federal Energy Regulatory Commission) under the Federal Power Act. See Tacoma v. Taxpayers of Tacoma, supra. Even if the appellate court suspects, and in this case assumed, that the PUD withheld facts from the Commission and the Secretary of the Interior, neither the district court nor the appellate court had the necessary jurisdiction to determine such questions or issues. That is not to say that there was no forum for such determination. In fact, there was a forum for such determinations in 1952 and 1963 when the principle licensing orders were issued. At that time, the forum was the Federal Power Commission and the Federal Power Commission made the decision based upon the record before it, which included submissions by the Secretary of the Interior and members of the Kalispel Indian Community. (See the 1952 licensing order.) As previously shown, if, at this late date, the United States believes that the licensing orders should be amended or that the PUD has violated such license, such issue should first be presented to the administrative agency which made those decisions in the first instance. However, it must be recalled that the Federal Power Act does not authorize unilateral amendment of licenses by the agency or even by Congress. (§ 6 of the Federal Power Act [16 U.S.C. § 799], and § 28 of the Federal Power Act [16 U.S.C. § 822])

3. Federal Courts Should Construe Federal Licenses In A Manner Which Is Consistent With The Intent Of The Agencies.

The appellate court has eviscerated license Article 33. While doing so, the appellate court made several assumptions

that are not supported by the record before the Court. The Court assumed that the PUD was malevolent (App. 8a, note 2; 28 F.3d at 1537, note 2). The appellate court ruled that Article 33 does not authorize the PUD "to flood Reservation land" (App. 8a, 28 F.3d 1548) and entirely ignores express language in the license (and also in the record before the Court) that the FPC intended for the PUD to affect "allotted lands within Calispel (sic) Indian Reservation." (App. 53a) The appellate court concluded that even though Article 33 created an administrative remedy, such "administrative remedy" was not "intended to affect the rights of the Tribe and the United States if they chose instead to file a trespass action in federal court, as they did." (App. 9a, 28 F.3d at 1548) Of course, the trespass action was filed 30 or 40 years after the remedy was created and more than 30 years after the remedy had been construed by the Secretary of the Interior when it granted the original easements to the PUD. The appellate court ignored the fact that the PUD had made a good faith effort to obtain new easements, which are authorized by law. See 25 U.S.C. § 323. The appellate court failed to point out that the PUD was frustrated in its efforts to obtain easements by the delays of the United States and the Tribe, as determined by the district court. (See Finding No. 9, App. 37a-39a) The appellate court placed no significance upon the fact that Article 33, as ambiguous as it may be, was requested as a condition by the Acting Secretary of the Interior. (App. 67a at 72a and 74a) The appellate court then went on to assume that the lands affected by the Box Canyon Dam are tribal lands, not allotted lands as originally determined by the Commission. (See the references to the Tribe and Tribal Lands in the court's opinion, i.e. App. 9a-10a (28 F.3d at 1548) and 14a-16a (28 F.3d at 1550). The appellate court assumed that the district

court erroneously applied state law. (App. 13a-18a, 28 F.3d 1549-1551)

The appellate court had no basis for such assumptions. Neither the United States nor the Tribe presented any part of the transcript of proceedings to the appellate court. (See the U.S. Attorney's letter re: transcript, App. 76a) The appellate court breached its own standards for reviewing district court decisions. Ninth Circuit Rule 30-1.2 requires a party challenging any district court finding to provide the circuit court with a reporter's transcript recording any discussion by the district court or counsel on the issue. Here no transcript was designated by the United States for its appeal. Generally, court findings will not be reviewed without a transcript. Trujillo v. Grand Junction Regional Center, 928 F.2d 973, 976 (10 Cir. 1991); and Powell v. Estello, 959 F.2d 22, 26 (5th Cir. 1992), cert. denied sub. nom., Harrison v. McKaskle, __ U.S. __, 113 S.Ct. 668, 121 L.Ed.2d 592 (1992).

In these proceedings, the appellate court turned the PUD's 1952 license upside down. Rather than affirm the damages determined by the district court based upon the evidence presented by the United States and based upon the entire record before the district court, which was not before the appellate court, the appellate court reversed the district court's on the damages to be awarded and stated as follows:

> Although use of the value of the tribal lands as part of the power project in calculating the annual charges not compelled by regulation or case law, we nevertheless conclude it is the most acceptable measure of damages for the Utility's trespass. As noted, the

> power site formula was reflected in the governing regulation prior to 1938, and the United States has advised the Court this is the formulation now applied by the Commission in fixing annual charges for use of tribal lands on all power projects. Its use will also assure the Tribe will not suffer an uncompensated loss from the Utility's past failure to comply with the Power Act and will encourage future compliance.

(App. 17a, 28 F.3d at 1551). Such statements and conclusions by the appellate court acknowledged that it would be "a matter of conjecture" to speculate in 1994 concerning the actions that the Commission may have taken in 1952 under different facts. (App. 15a, 28 F.3d 1550) The appellate court erroneously assumed, for the purposes of its opinion, that the different facts actually exist and that those facts were unknown to the Commission. There is no basis for such assumptions. Such assumptions of fact are absolutely erroneous and are simply untrue. The appellate appears to assume that facts were withheld from the Commission, an assumption for which there is no basis whatever.

The analysis of the appellate court concerning damages is also based on the argument that § 4(e) and § 10(e) of the Federal Power Act are applicable. (App. 13a-18a, 28 F.3d at 1549-51). Section 4(e) authorizes the Secretary of the Interior to specify conditions to be included in the license (i.e., Article 33) and § 10(e) authorizes the Commission to fix a reasonable annual charge for use of "tribal lands" in an Indian reservation. The Commission made a finding that the project would not "interfere or be inconsistent with the purposes of any withdrawal of public lands" (App. 61a, Finding

(6)), and the Commission included Article 33. When the license was issued, the project apparently only affected "allotted lands." (App. 53a) There is no showing that the licensed project affected "tribal lands." Allotted lands are subject to condemnation. 25 U.S.C. § 357. Furthermore, whether the lands are allotted or tribally owned, the United States Secretary of the Interior has the authority to issue easements on such lands. 25 U.S.C. § 323.

The appellate court's conclusion that the Commission failed to make the findings required by § 4(e) of the Federal Power Act are without foundation in fact or law. The Commission determined that the Box Canyon Project would affect allotted lands within the Kalispel Indian Reservation. (App. 53a) Thereafter, the Commission made findings that "the issuance of the license ... will not interfere or be inconsistent with the purposes of any withdrawal of public lands... ." (Finding (6), App. 61a) In a similar situation, the Commission issued an order issuing a license with similar determinations to the Department of Water Resources of the State of California, Project No. 2100, 17 FPC 262 (1957). For Project No. 2100, the Commission determined that the project would affect "certain lands held in trust by the United States for Indians." Id. In Finding (8) in the licensing order for Project 2100, the Commission stated "the issuance of a license for the project as hereinafter provided will not interfere or be inconsistent with the purposes of any reservation or withdrawal of public lands... ." 17 FPC at 265. The 1957 license for Project 2100 also included for the compensation of affected Indians for damage to Indian properties caused by the project and provided that if an agreement could not be reached between the Indians, the State of California, and the Secretary of the Interior, the license would be

required to pay fair market value of the damage as determined by a board of disinterested appraisers selected for that purpose. The 1957 licensing order is quite similar to the 1952 licensing order issued for the Box Canyon Project. The point is that the provisions of the PUD's license were not unusual and appeared to be similar to other licenses issued contemporaneously.

After acknowledging that it would be inappropriate to speculate about the actions that the Commission may have taken under different facts in 1952, and even though the appellate court had no knowledge of the proceedings before the district court since neither the United States nor the Tribe presented any record of such proceedings to the appellate court, the appellate court relied upon a mere argument by the United States concerning current Commission orders and reversed the district court's determination of damages, concluding that powersite value would be more fair. (See App. 17a-18a, 28 F.3d at 1551) The conclusions and statements by the appellate court were made with no record and no support other than arguments made by the United States and the Tribe.

Furthermore, there is no basis for a conclusion that information was withheld from either the Secretary of the Interior or the Commission. See the Orders of the Commission and the 1952 letter from the Acting Secretary of the Interior in the Appendix. The district court made a specific finding that the PUD did not act in bad faith. (App. 39a). Article 33 was included at the request of the Acting Secretary of the Interior. The damages found by the district court were based upon the evidence presented by the United States. (District Court Finding 17, App. 41a, and District

Court Schedule A, App. 45a-46a) It is the United States that elected to pursue damages in the United States District Court by filing its complaint rather than negotiating with the PUD. The district court's findings and judgment were consistent with the prior statements and negotiations between the PUD and the Bureau of Indian Affairs under the Secretary of the Interior. The damages determined by the district court were consistent with compensation that would be appropriate when the PUD exercises its rights of eminent domain under the Federal Power Act and under 25 U.S.C. § 357. The conclusions of the appellate court on damages are without foundation and should be reversed by this Court.

4. United States v. Clarke Should Be Overruled Or Distinguished In This Case.

The appellate court relied, in part, upon the holding in United States v. Clarke to support its conclusion that the PUD trespassed on the Indian lands. (App. 10a, 28 F.3d at 1548) The lands at issue in the case were thought by some, including the State of Washington, to belong to the State as being lands belonging to the bed of a navigable river which were acquired under the equal footing doctrine, the boundary to which was determined by the line of ordinary high water. After the district court determined that the line of ordinary high water was at an elevation substantially lower than the line contended by the State and the PUD, the PUD immediately commenced a condemnation action to obtain the right to overflow such lands. In United States v. Clarke, no such condemnation action was ever commenced. United States v. Clarke, 445 U.S. at 254 (1980).

The district court failed to recognize the authorization established by the licensing orders issued by the FPC and the right of the PUD to condemn Indian lands. See Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960); Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958), and 16 U.S.C. § 814. A contributing factor to the district court's conclusion with respect to trespass was the holding of this Court in United States v. Clarke, 445 U.S. 253 (1980), which reversed the Ninth Circuit Court's decision in United States v. Clarke, 590 F.2d 765 (9th Cir. 1979), and the fact that inverse condemnation is a part of the condemnation law of the State of Washington. Under the law of the State of Washington, the only remedy available to the owner of the property taken by a person having the power of eminent domain is reasonable compensation for the taking or damaging of private property for public use. Brazil v. City of Auburn, 93 Wn.2d 484, 610 P.2d 909, 913, 916 (1980). Under all of the facts and circumstances herein, the principal of inverse condemnation under the law of the State of Washington should be applied to all allotted lands within the Kalispel Indian Reservation as of the time when the taking occurred, since state law is the applicable law under 25 U.S.C. § 357. United States v. Clarke should either be distinguished based upon the facts of this case[7], or United

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[7] The relevant facts of this case include: (1) the PUD's right of eminent domain or for condemnation are based upon a license issued by the Federal Power Commission under the Federal Power Act; (2) the license includes a provision for compensation for the use of Indian lands which was requested by the Acting Secretary of the Interior; (3) the designees of the Secretary of the Interior had previously negotiated with the PUD in good faith and had

(continued...)

States v. Clarke should be overruled as being an inappropriate limitation on the eminent domain rights of persons under state law, particularly where state law authorizes the occupancy of lands subject to the payment of just compensation under the theory of "inverse condemnation." United States v. Clarke could easily be limited to its facts where there was apparently no dispute concerning the ownership of land before the Court and where no condemnation proceeding had been commenced after such land ownership dispute was resolved. However, the better rule would be to reconsider the holding of the Court in United States v. Clarke and to follow the logic expressed by Judge Kennedy in United States v. Clarke, 590 F.2d 765 (9th Cir. 1979).

5. The District Court And The Appellate Court Had Jurisdiction To Determine Title To Property.

It is clear, and it is uncontested, that both the district court and the appellate court had the necessary jurisdiction to determine the property issues (other than the issue of "trespass"). It is undisputed and uncontested that the appellate court and district court had the necessary

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[7](...continued)
approved compensation for the use of Indian lands and had approved overflow easements on Indian lands in the first instance (after the 1952 license was issued) and subsequently, after the 1963 Commission Order was issued, delayed negotiating with the PUD and thereafter commenced litigation against the PUD, claiming trespass; (4) the PUD was always willing and able to pay just compensation for the use and occupancy of Indian lands; (5) after the dispute over the ownership of the lands at issue was resolved, the PUD immediately commenced condemnation proceedings.

jurisdiction to determine the issue of just compensation for the use of Indian lands or the damage to Indian lands. The appellate court should have affirmed the district court except for the determination of trespass and the dismissal of the PUD's condemnation action. Rather than collaterally attacking the licensing orders of the Commission and attacking the integrity of the PUD, the appellate court should have accepted the Commission's licensing orders, upheld the intent of the Commission when such orders were issued, and should have determined the issues that were properly before it.

CONCLUSION

The Petition for Writ of Certiorari should be granted to the appellate court's decision as it relates to trespass, damages, and injunction relief.

RESPECTFULLY SUBMITTED this 13th day of December, 1994.

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